Shahron bin Mahmud v MBf Finance Bhd

HIGH COURT (PULAU PINANG) — CIVIL APPEAL NO 12–24 OF 2002
KAMALANATHAN RATNAM J
15 JULY 2002

Contract *— Termination — Notice of termination — Whether the plaintiff had given notice of termination to the defendant — Whether the notice of demand could be construed as a notice of termination of the agreement*

Contract *— Construction of terms of contract — Termination of agreement clause — Clause bore two possible interpretations — Whether construction most favorable to defendant must be given*

By a hire purchase agreement ('the agreement') dated 26 September 1996, the defendant, as hirer, purchased a Super Backhoe Loader ('the loader') from the plaintiff, a finance company. It was agreed, inter alia, that the defendant would settle the full amount of RM177,600 in 60 monthly installments of RM2,960 a month. The plaintiff contended that the defendant had breached the agreement by failing to pay the monthly installments despite numerous reminders. The defendant had meanwhile rented the loader to one Sukardi bin Shukor. The plaintiff terminated the agreement and repossessed the loader on 15 April 1998 from Sukardi bin Shukor and resold the loader on 12 January 1999 for RM48,000 and then claimed for RM90,386.96 being the balance due together with interests and costs. The defendant contended that he had paid the monthly installments from October 1996 to January 1998 and alleged fraud on the plaintiff for selling the loader at such a low price. The sessions court judge identified two issues at the trial, namely whether the repossession was without notice and the subsequent sale. The defendant gave evidence but his witness Sukardi bin Shukor did not attend. He denied that he was given any notice before the repossession by the plaintiff. The lower court found that the Hire Purchase Act 1967 ('the Act') did not apply because the loader did not fall within the scheduled items in Sch 1 to the Act. The lower court allowed the plaintiff's claim with costs and the defendant appealed.

Held, allowing the appeal with costs:

(1) Pursuant to cl 5 of the agreement, there are two ways for the owner/respondent to terminate the agreement: (i) without giving any notice; and (ii) by serving a notice. Assuming the owner terminates the agreement unilaterally without giving notice, how is he to communicate to the hirer that the agreement has come to an end and that the owner intends to exercise his rights including claiming the exact arrears due. So, naturally if the owner intends to exercise all its rights after termination of the agreement it must communicate with the hirer (see pp 238H–239A).

(2) The plaintiff/respondent submitted that before the loader was repossessed a demand notice dated 15 July 1999 had been given. This was an inaccurate submission because repossession had occurred on 15 April 1998 and the same loader was resold for RM48,000 and the notice of demand was dated 19 July 1999 claiming the balance. By no stretch of the imagination could the notice of demand dated 19 July 1999 be construed as a notice of termination of the agreement. The only other notice exhibited in the record of appeal is a note dated 18 May 1998 from the plaintiff to the defendant which reads as follows: 'Please be informed that we acknowledge having repossessed the above vehicle on 15 April 1998 at (place) as above address'. This too could not be deemed to be a notice of termination of the agreement (see p 239C–E).

(3) If the owner wishes to include a clause bearing two possible interpretations and has not explained why he had included the interpretation that he now seeks to invoke, then in all fairness to the defendant, the court must apply the principle enunciated by the Federal Court in *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 and hold that the construction most favorable to the defendant must be given. In the circumstances, no notice had been given in any manner set out by the owner itself. The court therefore allowed the appeal with costs on this ground alone without having to consider the other issue raised by the sessions court (see p 240A–B).

[Bahasa Malaysia summary

Melalui satu perjanjian sewa beli ('perjanjian tersebut') bertarikh 26 September 1996, defendan, sebagai penyewa, telah membeli sebuah Super Backhoe Loader ('pemuat tersebut') daripada plaintif, sebuah syarikat kewangan. Ia telah dipersetujui, inter alia, bahawa defendan akan menjelaskan amaun penuh sebanyak RM177,600 dalam 60 bayaran ansuran sebanyak RM2,960 sebulan. Plaintif berhujah bahawa defendan telah memungkiri perjanjian tersebut dengan gagal membayar bayaran ansuran meskipun telah diberi peringatan berulang kali. Sementara itu, defendan telah menyewa pemuat tersebut kepada seorang bernama Sukardi bin Shukor. Plaintif menamatkan perjanjian tersebut dan memiliki semula pemuat tersebut pada 15 April 1998 daripada Sukardi bin Shukor dan menjual pemuat tersebut pada 12 Januari 1999 untuk harga RM48,000, dan kemudian menuntut RM90,386.96 sebagai baki yang terhutang bersama faedah dan kos. Defendan berhujah bahawa beliau telah membayar bayaran ansuran mulai Oktober 1996 hingga Januari 1998 dan mengatakan fraud oleh pihak plaintif kerana menjual pemuat tersebut pada harga yang begitu rendah. Hakim mahkamah sesyen mengenal pasti dua isu di perbicaraan, yakni sama ada pemilikan semula itu adalah tanpa notis dan jualan berikutnya.

Defendan memberi keterangan tetapi saksinya Sukardi bin Shukor tidak hadir. Beliau menafikan bahawa beliau telah diberikan sebarang notis sebelum pemilikan semula oleh plaintif. Mahkamah rendah mendapati bahawa Akta Sewa Beli 1967 ('Akta tersebut') tidak terpakai kerana pemuat tersebut tidak dirangkumi oleh perkara-perkara yang berjadual dalam Jadual 1 Akta tersebut. Mahkamah rendah membenarkan tuntutan plaintif dengan kos dan defendan merayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Menurut kl 5 perjanjian tersebut, terdapat dua cara untuk pemilik/responden menamatkan perjanjian: (i) tanpa memberi sebarang notis; dan (ii) dengan menyampaikan notis. Dengan menganggap pemilik menamatkan perjanjian secara satu pihak tanpa memberi notis, bagaimanakah beliau dapat memberitahu penyewa bahawa perjanjian tersebut telah tamat dan pemilik ingin menggunakan segala haknya termasuk menuntut jumlah bayaran tunggakan yang terhutang? Maka, jikalau pemilik ingin melaksanakan segala haknya selepas penamatan perjanjian, beliau mesti memberitahu penyewa (lihat ms 238H–239A).

(2) Plaintif/responden berhujah bahawa sebelum pemuat tersebut dimiliki semula, satu notis tuntutan bertarikh 15 Julai 1999 telah diberi. Ini merupakan hujah yang tidak tepat kerana pemilikan semula telah berlaku pada 15 April 1998 dan pemuat yang sama dijual untuk harga RM48,000, dan notis tuntutan bertarikh 19 Julai 1999 menuntut bakinya. Notis tuntutan bertarikh 19 Julai 1999 tidak mungkin boleh ditafsirkan sebagai satu notis penamatan perjanjian tersebut. Satu-satunya notis lain yang diekshibitkan dalam rekod rayuan adalah satu nota bertarikh 18 Mei 1998 daripada plaintif kepada defendan yang mengatakan: 'Please be informed that we acknowledge having repossessed the above vehicle on 15 April 1998 at (place) as above address'. Ini juga tidak boleh dianggap sebagai notis penamatan perjanjian tersebut (lihat ms 239C–E).

(3) Sekiranya pemilik ingin memasukkan klausa yang mempunyai dua tafsiran dan tidak menjelaskan tafsiran yang ingin digunakannya, demi bersikap adil kepada defendan, mahkamah mesti memakai prinsip yang dilafazkan oleh Mahkamah Persekutuan dalam *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 dan menggunakan tafsiran yang paling memihak kepada defendan. Dalam keadaan ini, tiada notis telah diberi dalam apa-apa bentuk yang dinyatakan oleh pemilik sendiri. Maka mahkamah membenarkan rayuan dengan kos atas alasan ini sahaja tanpa menimbang isu yang satu lagi yang dibangkitkan oleh mahkamah sesyen (lihat ms 240A–B).]

A **Notes**

For cases on notice of termination under contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 3895.

For cases on construction of terms of contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 2348–2420.

B **Cases referred to**

Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29 (folld)

C **Legislation referred to**

Hire Purchase Act 1967

Zakaria Md Saad (*Zakaria & Co*) for the appellant/defendant.

Rosni Haid bte Mat Rifin (*Prem Singh* with her) (*Hargopal Singh & Co*) for the respondent/plaintiff.

D **Kamalanathan Ratnam J**:

Facts

By a hire purchase agreement ('the agreement') dated 26 September 1996, the defendant, as hirer, purchased a Super Backhoe Loader ('the loader') E bearing Registration No KAN 3542 from the plaintiff, a finance company, upon the terms and conditions contained in the agreement. It was a term, inter alia, of the agreement that the defendant would settle the full amount of RM177,600 in 60 monthly instalments of RM2,960 per month.

F *Plaintiff's case*

The plaintiff contended that in spite of numerous demands, the defendant had failed to pay the monthly instalments and had therefore breached the agreement. The plaintiff then terminated the agreement and repossessed the loader on 15 April 1998 and resold the loader on 12 January 1999 for G RM48,000. The plaintiff then claimed the sum of RM90,386.96 being the balance due, together with interest and costs.

Case for the defendant

The defendant contended, in his defence, that he had paid the monthly H instalments of RM2,960 from October 1996 to January 1998 when he made the final payment. The defendant contended that the plaintiff was wrong to repossess the loader from one Sukardi bin Shukor to whom the defendant had rented out the said loader. Whilst not making any counterclaim, the defendant merely pleaded that as a result of the repossession he had to refund the sum of RM12,000 to Sukardi bin Shukor to whom he had rented I out the loader for three months at RM4,000 a month. The defendant also alleged that there was fraud on the part of the plaintiff for selling the loader at such a low price of only RM48,000.

Findings of the lower court

The sessions court judge identified two issues at the trial, namely:

(i) whether the repossession was without notice; and

(ii) the subsequent sale.

During the trial, the plaintiff produced a notice dated 18 May 1998. The defendant gave evidence but his witness Sukardi bin Shukor did not attend. He denied that he was given any notice before repossession by the plaintiff. He did not call any witnesses to back his allegation up that the said loader was sold below its value by the plaintiff. The lower court found that the Hire Purchase Act 1967 ('the Act') did not apply to this case because the loader did not fall within the scheduled items in Sch 1 to the Act. The sessions court allowed the plaintiff's claim with costs. Being dissatisfied with that decision, the defendant appealed.

Findings of this court

Clause 5 of the said agreement reads as follows:

> If the hirer shall
>
> (a) make default in punctually paying the initial payment or any of the hire rentals or any other sums payable under the Agreement (whether demanded or not);
>
> (b) ...
>
> (c) ...
>
> (d) fail to observe and perform any of the terms, conditions and stipulations on his part herein contained; or
>
> (e) ...
>
> (f) ...
>
> then it shall be lawful for the owner (but without prejudice to the owner's claim for arrears of hire or damages for breach of agreement and without discharging any liability of the hirer to the owner) without notice to terminate this hiring or by written notice sent (by them or otherwise) to or left at the hirer's last known address forthwith to determine this hiring and the owner's consent to the hirer's possessing of the said goods shall be deemed to be withdrawn and the hirer shall forthwith at the hirer's expense deliver up the said goods to the owner and the owner and its servants or agents shall be entitled without any notice to enter upon any premises where the said goods may be and seize and take possession thereof, and to recover all charges, costs and expenses incurred in connection therewith.

It seems apparent that pursuant to cl 5 of the agreement, there are two ways for the owner/respondent to terminate the agreement:

(i) without giving any notice; or

(ii) by serving a notice.

Assuming the owner terminates the agreement unilaterally without giving notice, how is he to communicate to the hirer that the agreement has come

to an end and that the owner intends to exercise his rights including claiming the exact arrears due? So, naturally if the owner intends to exercise all its rights after termination of the agreement it must communicate with the hirer.

The second method of terminating the agreement pursuant to cl 5 is by the owner giving written notice of termination either by posting it or by dispatching it to, or by leaving it at the hirer's last known address. I do not know and nor has it been explained either to the court below or to me the reason the owner included in the agreement, the first method of termination, namely without giving any notice. The defendant/appellant in this case contended that no notice of termination was given to him. He only knew that the loader had been repossessed when Sukardi bin Shukor went to see him and informed him of the repossession from his person.

In reply, Cik Rosni for the plaintiff/respondent submitted that before the loader was repossessed, a demand notice dated 15 July 1999 had been given. This is an inaccurate submission because repossession had occurred on 15 April 1998 and the same loader was resold for RM48,000, and the notice of demand was dated 19 July 1999 claiming the balance after taking into account all sums due and after setting off the sum of RM48,000 recovered from the resale of the loader. By no stretch of the imagination could the notice of demand dated 19 July 1999 be construed as a notice of termination of the agreement. The only other notice exhibited in the record of appeal is a note dated 18 May 1998 from the plaintiff to the defendant which reads as follows: 'Please be informed that we acknowledge having repossessed the above vehicle on 15 April 1998 at (place) as above address'. This note too cannot be deemed to be a notice of termination of the agreement. In *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29, in considering whether insurers were liable to indemnify their insured in the face of an apparent ambiguity in the policy, Raja Azlan Shah FJ (His Royal Highness as he then was) said at p 31 as follows:

> It is of course established law that in this case the motor insurance policy which is a contractual document, is subject to the same general rules of interpretation as any other written document: see *Smith v Accident Insurance Co* (1870) LR 5 Exch 302, at p 307. One of those rules is that in any written document the words are prima facie to be construed 'in their plain, ordinary, popular meaning, rather than their strictly precise, etymological, philosophic, or scientific meaning, see 22 *Halsbury's Laws of England* (3rd Ed) p 212, para 402.

Then again, at p 32, his Lordship said:

> It also seems to me that as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say, if there is a doubt as to its extent, and the question were to arise as to the liability of the insurers, the construction must be favourable to the assured must be given to him, but I have come to the conclusion that the learned judge was right in the interpretation he put on it.

Even though the case before me is not based on an insurance policy, it is my judgment that the same reasoning must apply. If the owner wishes to include a clause bearing two possible interpretations and when he has not even bothered to explain why he had included the interpretation that he now seeks to invoke, then this court must, in fairness to the defendant, apply the principle enunciated by the Federal Court in *Malaysia National Insurance Sdn Bhd* and hold that the construction most favourable to the defendant must be given. In the circumstances, I hold that no notice had been given in any of the manner set out by the owner itself. I therefore allowed the appeal with costs on this ground alone without having to consider the other issue raised by the sessions court.

Appeal allowed with costs.

Reported by Chew Phye Aun